

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendray
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of an Investigation and Audit of
Northern States Power Company's Service
Quality Reporting

ISSUE DATE: March 10, 2004

DOCKET NO. E,G-002/CI-02-2034

ORDER ACCEPTING SETTLEMENT
AGREEMENT, AS MODIFIED

PROCEDURAL HISTORY

On August 8, 2002, the Commission met to consider the possible effects of financial difficulties at NRG Energy, Inc. (NRG) and Xcel on Northern States Power Company (NSP) and its customers. The Commission decided to open a docket (Docket No. E,G-002/CI-02-1346) and directed Xcel to respond to questions and provide information, as it agreed to do, by August 19, 2002.

On August 13, 2002, the Commission issued its Notice of Procedures and Comment Period, with a list of questions and information requested from Xcel and NSP. Between August 19, 2002 and September 24, 2002, interested parties filed comments.

On October 22, 2002, the Commission issued an Order in Docket E,G-002/CI-02-1346 (the 1346 Docket) expressing concern that the financial difficulties of Xcel and NRG could adversely affect NSP's provision of safe, adequate, and reliable service. The Commission directed an independent audit of Xcel's service quality reporting.

On January 6, 2003, the Commission issued its ORDER BIFURCATING PROCEEDING, GRANTING INTERVENTION AND CLARIFYING APPLICABILITY OF METER READING ISSUES. The Commission agreed with the Minnesota Department of Commerce's (the Department's) request to put the independent audit of Xcel's service quality reporting in a separate docket, resulting in the opening of the current docket, E,G-002/CI-02-2034.

On March 10, 2003, the Department and the Residential and Small Business Utilities Division of the Office of the Attorned General (RUD-OAG) filed *Fraudwise's* Progress Report Regarding its Service Quality Investigation with the Commission.

On April 17, 2003, the Commission issued its ORDER CONTINUING INVESTIGATION AND REQUIRING NOTICE TO EMPLOYEES, PAYMENT OF INVOICE, AND LETTER OF COMPLIANCE.

On August 4, 2003, the RUD-OAG and the Department filed *Fraudwise's* Final Report of Service Quality Investigation.

On August 7, 2003, the Commission established a comment period for Xcel to respond to the *Fraudwise* report. Comment periods were also established for parties. No comments were received.

On September 24, 2003, Xcel, the Department, and RUD-OAG, filed a Settlement Agreement.

On October 24, 2003, Xcel filed the expenditure plan for reliability improvements referenced in Provision 5 of the Settlement Agreement.

On November 14, 2003, Xcel reported compliance with various components of the settlement and filed an overview of the service quality plan.

Between October 17, 2003 and January 7, 2004, comments and replies were filed by Myer Shark, Legal Services Advocacy Project, Rebecca Winegarten, Xcel, the Department, and the RUD-OAG.

The Commission met on January 22, 2004 to consider this matter.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

In the course of the Commission's investigation into the possible effects of financial difficulties at NRG and Xcel on Northern States Power Company customers¹, serious allegations were made by persons who chose to remain anonymous regarding the integrity of Xcel's service quality reporting. Because the integrity of a utility's reporting is an essential cornerstone of the regulatory compact, the Commission undertook to get to the bottom of the allegations and initially did so as part of the 1346 Docket.

¹ Docket No. E,G-002/CI-02-1346.

Based on input from the two public agencies (the Department and the RUD-OAG) the Commission determined that an outside auditing entity, paid for by the Company but selected, directed, and working in cooperation with the two public agencies, would be the best approach. The Commission stated that the auditing operation would require multiple skills (such as accounting, engineering and interviewing) and left it in the hands of the two agencies to arrange for a thorough and competent review of these allegations.

Subsequently, the Department requested that the Commission open a new docket, separate from the 1346 Docket, to receive the auditor's report and to treat the service quality reporting issues. The Commission opened the current investigation docket² for that purpose.

II. AUDITOR'S FINAL REPORT

Fraudwise noted that the scope of its work, as identified in its contract, was to evaluate the integrity and accuracy of Xcel's service outage reporting practices and systems. The Commission finds that *Fraudwise* has provided what the contract called for.

Beginning at page 5 of its report, *Fraudwise* listed nine findings:

1. Xcel provided physical documentation for all outages listed on the spreadsheets. However, only 18.78 percent of these outages had complete documentation for the spreadsheet information. (Discussed at pages 9-10 in the report.)
2. Switching jobs are generally those involving more customers and are usually longer durations. Approximately 31 percent of switching jobs occurring in February and March 2002 were not included in Xcel's filing with the Department of Commerce. Considering the possible size and duration of these outages, this could have a large impact on SAIDI³ and other performance measures. (Discussed at page 15 in the report.)
3. A large percentage of outages have no trouble ticket, or no "Restore Time" reported on the trouble ticket. These outages are approximately nine percent more likely to be under 90 minutes than those outages with a "Restore Time" reported. (Discussed at pages 15-17 in the report.)
4. Only 55 percent of the outages used in calculating SAIDI had a trouble ticket with a "Restore Time" recorded. Approximately 22 percent of those outages contained duration misstatements. The "Time In" which is used in the calculation of the duration was different

² Docket No. E,G-002/CI-02-2034.

³ **System average interruption duration index or SAIDI:** system average interruption duration index or "SAIDI" means the average customer-minutes of interruption per customer. It is determined by dividing the annual sum of customer-minutes of interruption by the average number of customers served during the year, using storm-normalized data.

than the “Restore Time” on the trouble ticket. The numbers above do not take missing information into consideration. (Discussed at page 18 in the report.)

5. Based on data located in Xcel spreadsheets, 75% of outages affecting more than 100 customers are under two hours. These spreadsheets indicate data on trouble tickets that differ from the corresponding Distribution Dispatch Services (DDS) records. These differences are considered misstatements and the larger jobs are misstated at almost a 10% higher rate than outages affecting fewer customers. (Discussed at pages 18-19 in the report.)

6. When no “Restore Time” is available, the likelihood of the duration being listed as 60 minutes, more than triples. This finding supports the testimony provided in the Interviews section, which states certain employees were ordered to record durations at 60 minutes in order to control SAIDI and other outage measurements. (Discussed at pages 16-17 in the report.)

7. Based upon DDS information in the spreadsheets provided to *Fraudwise* by Xcel, the filing made with the Commission for July 2002 should be reviewed. These two outages affect over one hundred customers and one outage lasts almost a month and a half, and the other outage lasts for nearly two months. Without the documentation requested, this statement may or may not be verified or dismissed.

8. The easiest and most concrete way of proving misstatements of outages by Xcel is by comparison of switching documents to Reliability Energy Management Systems (REMS) reports. Comparisons of these documents are provided on pages 23-24 of the report.

9. The reason not many people know about questionable practices at Xcel is not many employees were in control of outage records. Also stated were beliefs that *Fraudwise* would need to find several million minutes in misstatements in order to change the SAIDI calculation. The conclusion reached through records review, and interviews is the system is corrupt, and it would be nearly impossible to show the magnitude of misstatement at Xcel. It appears many different schemes have been used in order to minimize outage durations.

Based on its evaluation of the integrity and accuracy of Xcel’s service quality reporting, *Fraudwise*’s key recommendation was that Xcel implement a quality assurance program to ensure accuracy of outage reporting data. *Fraudwise* recommended that the program include certain requirements:

1. Review the current system and determine if it is being used for intended purposes.
2. Incomplete documentation must be recorded as incomplete.
3. Source documents must be maintained in an organized system.
4. Source documents must be reviewed and compared to REMS reports.

5. A series of internal controls should be reviewed and maintained by several different levels of Xcel employees.

6. Restructure or eliminate bonuses based on statistical outcomes.

III. THE PARTIES' PROPOSED SETTLEMENT

Xcel, the Department and the RUD-OAG submitted a Settlement Agreement on September 24, 2003 to resolve all the issues raised in this proceeding. A copy of that Agreement is attached to and incorporated into this Order as Attachment A.

The parties stated that the Settlement Agreement was in lieu of formal responses to *Fraudwise's* Final Report. The parties stated that the Settlement Agreement will result in increased accuracy and auditability of reported outage statistics, provide benefits to customers in increased reliability and refunds, and improve regulatory oversight of reliability through development of a revised service quality plan.

Since the Settlement Agreement provided that the parties would work cooperatively to develop a revised service quality plan for the Company and file that plan or provide a progress report by October 24, 2003, the parties asked that the Commission delay its consideration of this matter for thirty days to allow the parties to develop and file the referenced revised service quality plan.

In addition to the commitment to develop a revised service quality plan, the Settlement Agreement included the following key provisions:

1. **Customer Refund:** Xcel agreed to pay \$1,000,000 in refunds to those customers who have experienced the longest duration of outages. The Company agreed to provide the Department and the RUD-OAG with information designed to allocate the refund to customers based on the duration of their outages and to begin implementing the refund in the first billing cycle 60 days after the Commission Order approving the Agreement.
2. **Revised Service Quality Plan:** The parties to the Settlement Agreement agreed to work cooperatively to submit a revised service quality plan for Xcel that would 1) revise current performance measures; 2) develop outage documentation standards that would provide an auditable trail; 3) establish new performance thresholds; and 4) establish new consequences for under performance.
3. **Fraudwise Recommendations:** Xcel agreed to implement all six of the recommendations made by *Fraudwise* in its Final Report and to report on its implementation of these recommendations within 60 days of a Commission Order approving the Agreement.

In addition, Xcel made commitments to increase expenditures to improve system reliability, to take specific identified steps to improve communication with customers who experience outages, and to report to the Commission, the Department and the RUD-OAG quarterly through 2004 on its reliability improvements, improved customer communications, customer refunds, customer outage information, and any other information addressed in the Settlement.⁴

IV. XCEL'S REVISED SERVICE QUALITY PLAN

In partial fulfilment of its commitments under the Settlement Agreement, Xcel filed an overview of its revised service quality plan, along with tariff pages incorporating the changes, on November 14, 2003. On January 7, 2004, the Company filed a revised tariff to address a request for clarification raised by the Legal Services Advocacy Project regarding the definition of "customer minutes."

The Company's revised service quality plan improves over the Company's current service quality plan in the following areas:

1. The Company's plan reduces the system average interruption duration index(SAIDI) to 98 minutes for the next two years. This standard will be reviewed and reset for the 2006 year.
2. It increases the telephone response rate to 80 percent in conformance with new rules.
3. It adopts a new emergency gas response measure to assure that Company personnel are on the scene of a leak within 35 minutes of an emergency call.
4. It sets the customer outage credit at \$50 for a sustained outage of more than 24 hours.
5. It increases nonperformance payments from \$400,000 annually to \$10 million annually and provides that the nonperformance payments may ratchet up by \$2 million annually. Payments are 50 percent for customer credits and 50 percent for Company improvements.
6. It enhances the Company's reporting requirements.

⁴ The parties stated that ongoing reporting requirements (beyond 2004) would be addressed in the revised service quality plan.

V. STATUS OF OTHER COMMITMENTS UNDER THE SETTLEMENT AGREEMENT

Pursuant to the Settlement Agreement, Xcel agreed to provide to the Department and the RUD-OAG information reasonably designed to facilitate allocation of the refund based on the duration of the customers' outages. The Company has done so.

Xcel also agreed to submit to the Commission, the Department, and the RUD-OAG a report on its planned reliability improvement expenditures under Provision 5 of the Agreement within 30 days of executing the Agreement. The Company has done so.⁵

In addition, Xcel agreed to report to the Commission, the Department, and the RUD-OAG quarterly on its reliability improvements, improved customer communications, customer refunds, customer outage information and any other information addressed in this settlement through 2004, with the final report filed in the first quarter of 2005. The Company is current with these obligations.⁶

With respect to Xcel's agreement to implement *Fraudwise*'s six recommendations listed above, the Company has agreed to report its actions to the Commission, the Department, and the RUD-OAG within 60 days of the Commission Order approving the Settlement Agreement.

VI. OBJECTIONS TO THE SETTLEMENT AGREEMENT

A. Comments of Rebecca Winegarten

On December 19, 2003, Xcel ratepayer Rebecca Winegarten filed comments regarding the Settlement. She cited previous attempts to define service standards and questioned whether the Settlement would have any real impact on customer service reliability since previous attempts had not been successful. She also cited an objection she made during the Distribution Standards rulemaking to a performance-based paradigm and renewed that objection.

Ms. Winegarten most strongly objected to Settlement Agreement provisions that, in her view, bound the Commission to approve the Agreement without exception or modification.

In further comments filed January 7, 2004, Ms. Winegarten agreed with the Legal Services Advocacy Project that approval of penalties was appropriate, but expressed grave doubts that any penalty would serve as deterrent or enticement for Xcel to provide more reliable service. She also objected that it was improper to allow Xcel to renegotiate service standards that have been established in the rulemaking proceeding.

⁵ See Xcel's October 24, 2003 filing.

⁶ See Xcel's Quarterly Report filed February 3, 2004.

In conclusion, Ms. Winegarden stated that the Commission's Order must send a clear message that customer service and quality, along with required reporting, must be reliable.

B. Comments of Myer Shark

On December 23, 2003, Xcel ratepayer Myer Shark filed comments regarding the Settlement Agreement. Mr. Shark objected that the record in this matter does not contain a fair and accurate statement of what took place and does not trace responsibility back in the Xcel chain of command to the source. Mr. Shark also stated that the Commission's Order should make clear that customers may accept the scheduled refund payment and pursue further claims for actual damage sustained due to any outages they experienced.

Mr. Shark also requested that the Commission's Order decide that Xcel ratepayers will not pay for the cost of the *Fraudwise* audit and report, Xcel's staffing expenditures for this investigation and proceeding, and the amounts returned to ratepayers via the refund plan. Mr. Shark also requested that Xcel be required to pay a fine in an amount adequate to reimburse the Commission, RUD-OAG, and the Department for staff time and expenses in dealing with the investigation and proceeding.

In conclusion, Mr. Shark recommended that the Order contain fair and appropriate measures to prevent repetition of the wrongs and penalties appropriate for the seriousness of the offense.

In further comments filed January 20, 2004, Mr. Shark asserted that implementation of the Settlement Agreement would deny the constitutional rights of Xcel customers and recommended that the Commission refer the docket to the Office of Administrative Hearings for a contested case proceeding.

VII. COMMISSION ANALYSIS

A. Response to Concerns Raised by Rebecca Winegarden and Myer Shark

The Commission agrees with Mr. Shark that the point of this docket is to adopt fair and appropriate measures to prevent repetition of the wrongs and to emphasize, as Ms. Winegarden states, that customer service and quality, along with required reporting, must be reliable. The Commission believes that in accepting the *Fraudwise* Report and adopting the Settlement Agreement as modified in this Order, the Commission has done just that.

The Commission accepts Ms. Winegarden's note of caution regarding the efficacy of penalties to promote as deterrent or enticement for Xcel to provide more reliable service and for this reason, in addition to the refund and adoption of penalties for future service quality underperformance, has adopted a number of system adjustments that promote accurate reporting and disincentivize persons from falsifying records. The Commission also finds that the performance-based paradigm that Ms. Winegarden identified and objected to is reasonable and appropriate, as the Commission found in adopting the Rules for Distribution Standards. Finally, the Commission disagrees with Ms. Winegarden's premise that the Settlement

Agreement has weakened existing service standards. To the contrary, the Settlement Agreement and its attendant revised service quality tariff improves over what the rules currently require by committing the Company, to pay penalties for underperformance and the Commission has, as detailed below, added penalties for underperforming with respect to accuracy of service quality reports.

The Commission also disagrees with Mr. Shark's assertion that an essential purpose of the docket was for the Commission to impose penalties on those who were responsible for falsifying the records. As discussed below, the primary purpose of the docket was to confirm the existence of, identify the source of, and devise measures to counteract the falsification/inaccuracy of service quality reporting. The Commission also does not agree, therefore, with Mr. Shark's assertion that the record does not provide adequate basis to resolve this matter and to move forward and that a contested case is necessary to provide an adequate record.

Mr. Shark requested that the Commission clarify that customers may accept the scheduled refund payment and pursue further claims for actual damage sustained due to any outages they experienced. Xcel made it clear at the January 22, 2004 hearing that this was the case and the Commission, accordingly, has viewed the Settlement Agreement with that understanding.

Mr. Shark's request that the Commission decide in this docket that no Company expenditures in connection with this investigation be paid by rate payers is premature. The Company would be able to recover these expenses only if in its next rate case it requests and is allowed to include these amounts in its test year. Such a request would be subject to challenge by any party and would be allowed only after Commission review and approval.

Finally, the Commission cannot consider Mr. Shark's request that the Commission fine the Company because the Commission has no statutory authority to levy the fines Mr. Shark has requested..

B. Resolution of the Docket

The Commission accepts the investigation conducted and the report submitted by the independent auditor, *Fraudwise*, together with the Settlement Agreement. Together, and as further modified in this Order, they provide a sound basis for concluding this matter and moving forward to resolve the problem that occasioned this docket.

In its Final Report, *Fraudwise* found that the outage reports supplied by Xcel to the Department are unreliable and inaccurate and that these problems were created by a small number of employees entering inaccurate information into the system, thus resulting in unreliable output data. *Fraudwise* did not withdraw the finding in its Interim Report that Xcel's outage reporting system was corrupt, but explained that it used the term in the sense that since certain information at Xcel was changed from its original correct condition, the system was corrupted with misinformation. *Fraudwise* further clarified that usage of the word "corrupt" was not meant to depict the Xcel organization but to describe the outage record keeping system reviewed in *Fraudwise*'s investigation.

In its Final Report, *Fraudwise* recommended that Xcel be required to implement a quality assurance program to ensure the accuracy of outage reporting data. *Fraudwise* stated that the Company's quality assurance program should include six specific items. *Fraudwise* identified no further investigative step required before being able to make that recommendation.

The Commission acknowledges that reasonable minds can disagree on when any investigation has been completed and when the time for implementing remedial actions to fix identified problems has arrived. In this case, however, much of the disagreement hinges on differing understandings of what it means to get to the bottom of this matter, as the Commission stated was its goal when it initiated this investigation. In one view, the bottom is only reached when all who are responsible for falsified records have been identified and assuredly punished. Only then, in this view, can regulatory accountability and confidence in the regulatory system be restored.

The Commission takes another view. While holding individual wrong doers accountable is desirable, the real bottom in this case is the systemic problem that fostered and allowed the misreporting at Xcel to continue. Identifying and punishing wrong doers while leaving in place a system that fosters misstatement of outage data does not resolve the problem.

For the Commission, then, the bottom of this matter is reached when the means have been identified to restore confidence in the integrity of a utility's reporting, an essential cornerstone of the regulatory compact. As properly delineated in *Fraudwise*'s Final Report, then, the purpose of this investigation is to ensure the accuracy of Xcel's outage reporting data.

The public agencies charged with representing the interests of ratepayers and the public interest, the Department and the RUD-OAG, have understood this approach and have strongly recommended that the Commission accept the Settlement Agreement. Likewise, the two consumer advocate organizations commenting in this matter have also urged acceptance of the Settlement Agreement as modified.⁷ These parties point to the substantial refund that Xcel has agreed to make as soon as the Settlement Agreement is approved. They also note that the Company has agreed to revised service quality provisions that are stronger than the current service quality rules in that they subject the Company to penalties for non-compliance. They also cite the Company's increased reporting and oversight obligations under the Settlement Agreement.

The misreported outage data phenomenon has a number of contributing factors. In this light, the Commission finds relevant benefit in Xcel's agreement to increase preventive maintenance expenditures, thereby reducing gross outages. Reducing the gross outages will reduce strain on the system and, hence, the occasions of misreporting. Increasing maintenance expenditures, therefore, contributes to the overall goal: restoring the integrity of the Company's reporting and the confidence of regulators and the public in that integrity.

⁷ Energy Cents Coalition (ECC) and the Legal Services Advocacy Project (LSAP).

At the same time, the *Fraudwise* Report found that a substantial part of the reporting problem was due to a limited number of Xcel personnel in control of outage records. Any resolution of the issues raised in this case, therefore must directly address that source of the problem. The question is, how best to change the human behavior that *Fraudwise* identified as the source of the misreported data. The Commission has reviewed the steps taken and committed to by Xcel in this matter and finds that these steps, with the addition of the ongoing independent monitoring and other modifications required in this Order, provide a sound and prudent way to address this human behavior problem.

Xcel stated that it has subjected the personnel involved with the reporting misstatements in the past to discipline. Much more important than punishment of individual workers, however, is the new system of checks and safeguards established by Xcel to guard against outage data manipulation by any Xcel personnel in the future. In this regard, Xcel has made two critical commitments:

- As specifically recommended by *Fraudwise*, Xcel has committed to eliminate employee bonuses based on outage statistics. Xcel has committed to revise its bonus provisions so that employees looking at the documentation created in the field and comparing it to the Company's electronic records will not have any incentive related to any reliability measurement. Xcel has assured that these employees will be assessed solely by how accurately they input the data.
- Coming at the problem from another direction, Xcel has assured that its new Output Management System (OMS) will not allow deletions of outage data and, although it will allow updates or changes to that data, the record will show when and by whom the data was changed. By making every record change trackable in this manner, this new OMS system will constitute a substantial deterrent against any improper adjustment of outage reporting data.

In response to these commitments, *Fraudwise* stated at the hearing on this matter that these changes addressed its concerns regarding systemic incentive to misrepresent the outage data.

In addition to these safeguards and incentives for Xcel and its employees to implement a trustworthy outage reporting system, the Commission will add two requirements to the Settlement Agreement as additional reasonable incentives to proper outage reporting:

1. Xcel will be subject to and pay for periodic audits of the accuracy of the customer outage data by an independent firm. The audits will be overseen by the Department and the OAG.
2. With reference to the under performance payments provided for in Sections B and E of Xcel's revised Service Quality Tariff filed January 7, 2004, insufficient or inaccurate documentation of outages will be added as a category of under performance

justifying the maximum total under performance payment.⁸ Since incomplete and inaccurate data were documented as a problem by *Fraudwise*, it is appropriate that Xcel's revised tariff include this additional measure of accountability.

Furthermore, consistent with resolving the concerns raised by the Legal Services Advocacy Project regarding measurement of the frequency and duration of outages, the Commission will require Xcel to make a compliance filing for Commission approval detailing how customer complaint numbers will be computed and reported by Xcel under the Settlement Agreement.

Finally, the Commission notes and Xcel has acknowledged the interim nature of the revised service quality plan resulting from the Settlement Agreement. Between now and 2005, the impacts and capabilities of the Company's new outage management system (OMS) will be assessed and potential revisions to the plan can be considered for implementation in the Company's 2006 service quality plan. In short, the currently adopted improvements to Xcel's quality reporting system will be monitored during this interim period to confirm the adequacy of these changes or to identify additional measures needed to achieve the goal in this docket: ensuring the accuracy of Xcel's outage reporting data.

VII. COMMISSION ACTION

In sum, the Commission finds that the parties' Settlement Agreement and Xcel's revised service quality plan, as further amended on January 7, 2004, with the additional clarifications, commitments and requirements noted herein, provide a sound basis for resolving the issue raised in this docket.

The Commission will, therefore, accept the Settlement Agreement as revised herein, direct Xcel to abide by the Settlement Agreement as revised, and, accordingly, consider this investigation closed on those terms.

ORDER

1. The *Fraudwise* Final Report is accepted.
2. The Settlement Agreement filed September 24, 2003 by Xcel, the Department and the RUD-OAG is accepted, as modified in this Order.
3. Unless any party to the Settlement Agreement rejects the modifications as provided by law, the Company shall implement its obligations under the Settlement Agreement, as modified in this Order.

⁸ Xcel's Service Quality Tariff as filed prescribes under performance payments for deficient performance with respect to several categories (customer complaints, SAIDI, SAIFI, meter reading etc.) but does not include a category for "insufficient or inaccurate documentation of outages." See Tariff 1.8, B. Nor does it include "insufficient or inaccurate documentation of outages" as a category of under performance measures. See Tariff 1.8, E.

4. Xcel shall pay for periodic audits of the accuracy of the customer outage data by an independent firm overseen by the Department and the RUD-OAG.
5. Xcel shall file an amended service quality tariff adding “insufficient or inaccurate documentation of outages” as a performance category justifying the maximum total under performance payment.
6. In addition to the reporting requirements under the Settlement Agreement, Xcel shall make a compliance filing for Commission approval that details how customer complaint numbers will be computed and reported by Xcel under the Settlement Agreement.
7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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Dissenting Opinion of Commissioner Marshall Johnson

In the Matter of an Investigation and Audit of Northern States Power Company's d/b/a Xcel Energy's Service Quality Reporting E,G-002/CI-02-2034

I respectfully dissent from the majority's decision to end this investigation because I believe that completing it is essential to preserving the trust on which the regulatory process is built. Explaining my position requires a brief history of this investigation.

The History of This Investigation

Xcel has filed with this Commission and with the Department of Commerce demonstrably inaccurate data on the reliability of its electrical service. This alone is worrisome because ensuring reliable service is one of the Commission's core functions,⁹ and it cannot be performed without accurate reliability data.

Worse, the Company was unable to correct the data's inaccuracies, once they were brought to its attention, because its underlying records were fragmentary, incomplete, and internally inconsistent. And worst of all, there were credible claims by current and former Company employees that at least some of the reliability data had been intentionally falsified.

The Commission therefore opened this investigation, stating its intention to "get to the bottom of these issues" and committing to the Department and the RUD-OAG the task of securing a contractor or contractors with the "multiple skills (such as accounting, engineering, and interviewing)" required for a "thorough and competent review of these allegations."¹⁰ The Commission ordered Xcel to pay the costs of the investigation.

In March of 2003 the contractor selected to spearhead the investigation, *Fraudwise*, filed a progress report. Among other things, that report stated that many Xcel employees who were thought to have knowledge of how the inaccurate data came to be filed refused to be interviewed, some citing fear of retaliation by Xcel. The report also stated that most of the employees who had agreed to be interviewed had done so only after being guaranteed anonymity.

In response to this report, Xcel asked the Commission to hold the investigation in abeyance for 30 days and to discontinue it entirely if the Company, the Department, and the RUD-OAG were able to reach an agreement on the Company's future reporting responsibilities. The Company stated that further investigation would only reveal what was already known – that the Company's system for tracking outages and compiling reliability data was incapable of providing the information *Fraudwise* was seeking.

⁹ Minn. Stat. § 216B.01.

¹⁰ Order Requiring Additional Information and Audit, this docket, October 22, 2003.

The Commission not only refused to delay the investigation but expanded its scope. It also expressed concern about the difficulties *Fraudwise* was facing in interviewing employees, stating flatly that the Commission “recognizes that Xcel can provide an atmosphere that encourages its employees to speak with the investigators and will require Xcel to do so.”¹¹ To accomplish this, the Commission required the Company to publish in its employee newsletter and to provide to affected employees by separate letter, the following information:

- a description of the Commission’s investigation;
- a statement that employees were encouraged to speak freely and openly with the *Fraudwise* investigators;
- the toll-free number of *Fraudwise* and the name of the *Fraudwise* contact person;
- a statement that the Commission’s investigation was not the same investigation as the one previously carried out by the Company’s law firm.

Despite this Order and the protection that the Commission expected it to provide to employees, *Fraudwise* was able to interview only one new witness between the Order’s issuance and *Fraudwise*’s final report. The final report stated that interviewers had contacted numerous employees who were believed to have information about the inaccurate data, and that all but one had refused to be interviewed, with many citing fears of retaliation.

The final report also found severe inadequacies in the reliability data filed by the Company, including the following findings:

- Only 18.78% of the outages examined had complete documentation.¹²
- Only 55% of the outages used to calculate the Company’s “SAIDI” – the reliability index used to determine penalties for failing to meet reliability goals – had documentation recording the time at which service was restored.¹³
- Some 22% of the outages making up that 55% had documentation that was internally inconsistent as to when service was restored.¹⁴

¹¹ Order Continuing Investigation and Requiring Notice to Employees, Payment of Invoice, and Letter of Compliance, this docket, April 17, 2003.

¹² *Fraudwise* Final Report, page 5.

¹³ *Fraudwise* Final Report, page 5.

¹⁴ *Fraudwise* Final Report, page 5.

- Outages with incomplete documentation were recorded as 60 minutes in duration three times as often as outages with complete documentation, lending credibility to a witness's claim that some employees were directed to record outage durations at 60 minutes regardless of actual duration.¹⁵
- Documentation provided by the Company shows several cases in which repair personnel were dispatched to the scene of an outage before it was reported, lending credibility to witnesses' claims that the Company sometimes "restarted" the clock when timing outages, to minimize durations.¹⁶
- The Company's system for recording outages was corrupt and appeared to have used different schemes to minimize outage durations.¹⁷

The Terms of the Settlement Agreement

Instead of filing comments on *Fraudwise's* final report, the Department, the RUD-OAG, and the Company filed a settlement agreement, the major terms of which are set forth below:

- The Commission's investigation ends.
- Xcel admits no wrongdoing.
- Xcel will make refunds totaling \$1,000,000 to customers who have suffered the longest (but not the most frequent) outages.
- The service quality standards Xcel must meet to avoid penalties will become more stringent, as will the penalties.
- Xcel will review and improve its outage management system.
- By January 1, 2005, Xcel will spend \$15,000,000 to \$20,000,000 more on tree trimming than the \$15,800,000 built into rates in 1993 for annual tree-trimming costs. (Since Xcel significantly underspent its tree trimming budget in several prior years, however, it is not clear that this expenditure represents any net gain for ratepayers, especially given the impact of inflation since 1993.)
- Xcel will create an ombudsman position to assist customers with outage problems, will hold public meetings to discuss outage concerns, and will improve its communication with customers on outage issues.

The settlement agreement states that it is based in part upon the parties' joint understanding that "The report [the *Fraudwise* final report] acknowledges that problems were created by a small number of people who have been subject to the disciplinary process and that Xcel

¹⁵ *Fraudwise* Final Report, page 6.

¹⁶ *Fraudwise* Final Report, page. 25.

¹⁷ *Fraudwise* Final Report, page 6.

Energy did not intend to misrepresent information reported to the Commission or the Agencies.” I respectfully submit that this is a misreading of the *Fraudwise* report.

The Settlement Agreement Should be Rejected and the Investigation Completed

The history of this proceeding, briefly recounted above, demonstrates that this investigation is not complete. The only fact that has been established is that Xcel filed seriously inaccurate reliability data under circumstances that suggest indifference to accuracy at best or intent to deceive at worst. The investigation has yielded no coherent account of how the inaccurate information came to be filed or how the Company dealt with the discovery that it had been filed.

The investigation has produced no assurance that the personnel or organizational culture issues that led to filing inaccurate data have been adequately addressed. The settlement agreement contains a vague reference to persons being “subject to the disciplinary process,” information not developed in the *Fraudwise* final report.

The settlement agreement should be rejected – not because it is based in part on an illusory premise, which it is, or because it offers largely illusory relief, which it does – but because it does not address or resolve the fundamental issue of how to restore trust in the accuracy and truthfulness of the information Xcel provides to regulators. In fact, by enabling Xcel to avoid explaining or taking responsibility for providing demonstrably false information, the settlement further undermines that trust.

Regulation cannot succeed without a high degree of trust between the Commission and all stakeholders. The Commission must trust that documents filed in its proceedings are offered in good faith and contain truthful and accurate information. The stakeholders must trust that the Commission acts with competence and integrity. Without this mutual trust, regulation loses its legitimacy.

When this mutual trust is broken, it is critical to determine what happened, how it happened, how it can be corrected, and how its recurrence can be prevented in the future. Pretending that a breach of trust can be safely ignored, as the settlement does, threatens the foundation of the regulatory compact. It rewards (at the least) inaccuracy, evasiveness, and obfuscation. It discourages others from maintaining high standards of forthrightness and veracity in their dealings with the Commission. It encourages cynicism toward the regulatory process.

The Commission should reject the settlement, continue its investigation, and use the tools at its disposal to accomplish its original objective to “get to the bottom of these allegations.” Those tools include the subpoena power,¹⁸ the power to compel the production of

¹⁸ Minn. Stat. §§ 216.18; 216A.05, subd. 3, 216B.28, 216B.29, 216B.30.

documents,¹⁹ the power to enter utility premises and examine records,²⁰ the power to protect witnesses,²¹ and the power to enforce its Orders through contempt or penalty proceedings in district court.²²

Like judicial bodies, the Commission seldom needs to resort to these coercive powers and uses them with restraint. Like judicial bodies, however, the Commission cannot treat candor toward the tribunal as optional and cannot permit parties who have been less than candid to simply change the subject.

However painful and messy it might be – and I suspect that it would be less painful and messy than many think – the Commission should complete this investigation. Completing the investigation would assure stakeholders and the public that the Commission has both the will and the ability to protect the integrity of its process. It would assure stakeholders and the public that their trust in that process is not misplaced. And it would reinforce the mutual trust between stakeholders and the Commission on which effective regulation depends.

Finally, the Commission would lose nothing of value by rejecting the settlement. Xcel is legally obligated to provide high-quality electrical service, and the Commission can and will enforce that obligation through normal regulatory procedures. In fact, Xcel’s annual service quality filing, which is required by rule and must include proposed reliability goals for the coming year, would have been the perfect opportunity to examine – on the record – substantive reliability issues. Those issues were not part of this case and should not have been treated as bargaining chips in an investigation focused on process integrity.

For all these reasons, I respectfully dissent.

Dated _____

Marshall Johnson
Commissioner

¹⁹ Minn. Stat. §§ 216.18, 216A.05, subd. 3, 216B.13.

²⁰ Minn. Stat. § 216B.12.

²¹ Minn. Stat. § 216B.31.

²² Minn. Stat. §§ 216.18, 216B.29, 216B.54, 216B.57-61.

Dissenting Opinion of Commissioner Greg Scott
MPUC Docket No. E,G002/CI-02-2034

This is my first dissenting opinion in six and a half years as a Commissioner. I tell the reader this for a couple of reasons: first, I have not written dissents because I generally do not believe my opinion, my answer, on a given issue is any better than the answer of my colleagues. So, writing dissents has never been important to me. On the flip side, the fact that I am writing this dissent today should tell you something about the importance with which I hold the central issue in this docket.

For me, the issue in this docket goes to the heart of our responsibility as regulators; our responsibility as an independent agency, free of political influence while surrounded by political influence. It goes to the heart of the PUC's role as the investigator, the holder of the public confidence. The integrity with which this agency carries out its responsibilities is far more important than any substantive decision.

I dissent from the majority opinion for four main reasons: first, the investigation into the integrity of Xcel's service quality reporting was barely started, much less completed. Obtaining substantive information from just four out of at least 32 possible witnesses does not constitute a complete, thorough, and competent investigation—the standard established by the Commission's own order.

Second, the witness interviewing process was so dominated by Xcel as to contaminate the witness testimony and violate the integrity of the investigative process. The domination is so severe that it puts Xcel, not the Commission, in the role of regulator.

Third, without even addressing the merits, the settlement agreement is premature because it was entered into before the investigation is complete.

Lastly, on the merits, the settlement agreement fails to address the only issue that was ever in this docket: the integrity of Xcel's service quality reporting. Instead, it purports to resolve issues that were never a part of this docket and for which there is absolutely no factual basis in the record for addressing much less "resolving." I cannot find such an agreement to be in the best interests of either Xcel ratepayers, who are entitled to a completed investigation, or Xcel shareholders, who will pay millions with no factual basis.

The second reason I tell the reader that this is my first dissenting opinion is to obtain the reader's forgiveness on the style of my dissent. It does not fit into the typical mode of dissenting opinions (assuming there is a "typical" mode—I really haven't seen very many). Some of you will think it is not very judicial; some will think it sounds fairy-tale-ish. To you I say, "Good for you—you got it." For me, every PUC order sends a message to those we regulate, those who advocate in front of us, and those whose interests we protect. Every order teaches a lesson, and the lesson this docket teaches is best told as a story. And so, my dissenting opinion is written as a story, as a lesson, if you will, to the utility leaders of the future.

I do not question the motives of the OAG-RUD or the DOC. Both are political agencies, with leaders ultimately accountable to the voters. They must advocate in the manner they believe appropriate. Nor do I question the motives of Xcel. Xcel should utilize “the system” of regulation in the manner best suited to the goals of the company.

My disagreement is solely with the Commission’s decision. Certainly, by virtue of their behavior, parties like OAG-RUD, DOC, and Xcel make the facts that create the story—and the story that follows was created by them. However, it is the exclusive province of the Commission to teach the lesson, send the message, approve or disapprove of the parties’ behavior, through its order. I disagree with the message sent, lesson taught, behavior approved of by the majority.

As you will see from the exhibits and citations, the story is based exclusively on the facts in this record as created by the parties. I alone am responsible for the tone and style of this dissent (i.e. do not blame PUC staff or PUC order writers).

Those of you allergic to non-traditional dissenting opinions should stop reading now. For the rest of you, welcome to the world of educating the future utility leaders of Minnesota.

Dated _____

Greg Scott
Commissioner

THE NEXT GENERATION: THE LATEST IN A SERIES OF EDUCATIONAL STORIES FOR FUTURE UTILITY LEADERS

Today's Lesson: How to "Deal" with Regulators

Today, future utility leaders, you are going to hear a story that will teach you how to deal with regulators. Do you remember a government agency called the Minnesota Public Utilities Commission (PUC), the primary entity Minnesota ratepayers rely on to regulate the monopoly utilities? The PUC will be our regulator again in this lesson. Our featured utility is Xcel Energy, an electric company.

In this story, the PUC teaches Xcel a very valuable lesson that you must not forget as you prepare to be utility leaders: If you get caught falsifying service quality outage records, inventing data, and presenting the corrupt data to the PUC as evidence of compliance with a standard the company is required to meet, don't worry. Don't admit you did anything wrong. Don't help the PUC discover what went wrong or who was responsible for it. Everything will be just fine. How? Well, that is what you will learn from this story!

Suppose you decide to do a merger with another company. The government agencies that represent the public (these agencies are called the Department of Commerce and the Residential-Utilities division of the Office of Attorney General) may demand that you make some agreements relating to service quality before they will tell the PUC that the merger should be approved. So, you enter into those agreements, including one establishing standards you must meet for outages and establishing reporting requirements where you show that you comply with the service outage standards. (Exhibit A, NSP/New Century merger standards for service outages and service outage reporting) If you fail to show compliance with the standards, you have to pay money.

The truth is, your reporting under these service outage standards is all messed up. Your employees aren't completing the forms in the proper way; some managers are filling in data without any facts, essentially, just making it up; some managers are restarting jobs to make it look like an outage didn't last as long as it really did; all kinds of records are missing. "Corrupt" is a good word to describe the situation. (see Exhibit B, Fraudwise Report dated August 1, 2003, p.6)

Now, for two years, you report this data that you know is corrupt and claim that you comply with the service outage standard. You know you can't actually prove compliance but, hey, why be in a hurry to fix what is working? After all, the government agencies to whom you report the data never suspect anything. Oh, sure, they might ask for some more data here and there but, basically, you have government fooled into believing that your reporting system works well. And you know it is not really the government's fault because you are in complete control of the information and data, so someone on the outside would have to look very deeply into the records to know anything is wrong. That is a wonderful part of being a supposedly regulated company: because the utility has all of the data and information, it also has all of the power. The PUC knows nothing except what Xcel tells it. They say

“knowledge is power” and it is; and so is owning and controlling the data. And Xcel does. And when you have and control all of the data, all of the knowledge, just who is regulating whom?

But things do sometimes fall through the cracks. While government is under control, your own employees blow the whistle on you by talking with a local newspaper reporter. A story appears in the paper. (Exhibit C, September 20, 2002 article from the St. Paul Pioneer Press) And once the PUC reads the story in the newspaper, it asks the government agencies to whom Xcel has been reporting the data to investigate the matter.

What do you do? Do you come clean and acknowledge that data has been made up? Do you acknowledge that data has been filled in after the fact based on guess work? Do you acknowledge that employees are poorly trained on the use of the system? Do you admit that your two different service centers don’t even do things the same way? Should you acknowledge problems and vow to fix them? Immediately offer to stand for a completely independent investigation by an entity of the PUC’s choosing?

Of course not.

Here is the lesson in summary fashion: All you need to do is dominate the investigative process in a way that keeps the PUC away from your employees and allows you to deflect government away from the issue of your corrupt service quality reporting data to other, fictitious issues.

First step: CEO writes letter to regulator saying “Independent third party says everything is fine.”

Have your CEO write a letter to the PUC claiming that an “independent third party” review shows the Company did nothing wrong. (Exhibit D, Brunetti letter dated October 7, 2002) Don’t worry about the fact that the “independent third party” review the CEO is asking the PUC to rely on was in fact conducted by a partner or senior associate from Xcel’s primary outside law firm. (Exhibit E, Sparby comments from January 22, 2004 hearing) Don’t worry about representing this lawyer review as being that of an “independent third party”; the government agencies responsible for advocating the public interest will not be concerned about it, and the regulator relied upon by Minnesota ratepayers (that, of course, is the PUC) will not be concerned about it.

Second step: control your employees

When you do your “independent third party” review by your primary law firm, be sure to interview all employees who might conceivably be involved, so they will know who is in charge and will know that the company knows of their involvement. Once you have interviewed thirty-two employees,²³ continue to create conditions designed to limit the number of interviews conducted by the investigator hired by the PUC.

²³ This is the number of employees Xcel’s primary law firm claims to have interviewed.

For example, rather than encourage total cooperation by all your employees, simply have eight management employees and four union employees meet with the PUC investigator. Be sure the meetings are held in the offices of the same firm that wrote the “independent third party” investigation report, the same firm that already met with the thirty-two employees, and the same firm that is presumably advising you on how to handle the investigation. In that way, the employees, having already spoken to the company’s attorney/investigator, and sitting now in the offices of the company’s attorney/investigator, will be reminded whose side they are on. In fact, this will work so well that your management employees will tell the PUC investigator that they “don’t remember anything.” (Exhibit F, O’Halloran comments from January 22, 2004 hearing)

You probably do not need to tell employees that they do not have to cooperate with the investigator hired by the state regulator because they will already be sufficiently fearful. In fact, many of the employees approached by the commission investigator will simply decline to participate out of fear of reprisal. (see Exhibit B, Fraudwise Report, p. 20).

And if employees decline to voluntarily participate, this is a bonus. Declining to participate isn’t a real option because government has the power to require them to testify. You see, government has to have this power or else one couldn’t really consider government to be a REGULATOR, right? If utility witnesses get to just say “NO”, there isn’t much regulation going on, is there?

However, neither of the government agencies responsible for assisting the investigator will assist the investigator in compelling the witnesses to cooperate. Even though one of the agencies clearly has the power to compel depositions (Exhibit G, Department of Commerce statutory authority to compel depositions, Minn. Stat. 216A.07), and the other apparently has the power to issue subpoenas (Exhibit H, Marker comments from January 22, 2004 hearing), do not fear, because neither will do so. And never mind that the PUC itself has the power to subpoena witnesses—neither of the government agencies will ever ask the commission to issue subpoenas²⁴, and the PUC will not do so on its own.

Now, you say, but if employees do not cooperate, and even assuming that the government agencies responsible for advocating the public interest and propelling the investigation forward fail to use their powers to compel cooperation, won’t the government investigator point out in its report that it was not able to talk with employees? And given that the whole point of the investigation was to focus on the people and documents involved in the false and corrupt reporting of service outages, won’t a failure to talk with employees cause the PUC to say that the investigation is not complete without this information? Isn’t the PUC especially likely to say this if the PUC’s investigator includes not just one but two provisions in its report complaining about the inability to talk to key Xcel employees? And isn’t it a slam

²⁴ Neither state agency assisting with the investigation came to the PUC to ask for subpoenas. The RUD was concerned about the fragility of union relations, and the Fraudwise report makes clear that much of the reluctance on the part of Xcel employees had to do with a fear of reprisal. The PUC has specific statutory authority to protect these employees. Minn. Stat. 216B.31 provides that any employee compelled to testify by the PUC cannot be subject to penalty, forfeiture, or punishment. See Exhibit I. Thus, had the agencies come to the PUC for subpoena relief, the concerns of both the RUD and the Xcel employees would seemingly have been alleviated. Of course, the Whistle-blower statute also offers protection (see Minn. Stat. § 181.932).

dunk the PUC will say this if one of the provisions in the report specifically says the report isn't complete until all key employees have been interviewed, especially given that it was the PUC itself that said so in a prior order?

The answer is,

"No."

The investigator for the regulator **did** say in at least two places that it was unable to interview key Xcel employees:

"Several current and former employees, including bargaining unit and non-bargaining unit employees of Xcel Energy were interviewed. Most of those interviewed did so only after being guaranteed that their identities would not be disclosed. Numerous other contacts were made with individuals identified during the investigation as having potential information pertinent to the investigation. Those individuals refused to be interviewed, some citing fear of potential reprisals. Additionally, this investigation recently received a list of people who had not been previously identified and who may have information relevant to the investigation. Since the release of the progress report, only one individual agreed to interview, and all attempts to interview other current or former Xcel employees have been unsuccessful."

Exhibit B, p.20.

The second place where the PUC's investigator complained about not being able to interview employees is found on page 24 of the same report, in a section entitled "IV. Remaining Work to be Performed—Per Progress Report". You see, the PUC had a meeting with everyone at a mid-point to see how things were going and to provide further direction. This section of the report is a specific listing of what the PUC asked the investigator to do at the halfway point of the investigation in order for the report to be considered finished. The third item on the list reads "Conclude the interviewing process." In explaining how the investigator attempted to fulfill this function, we see:

"Repeated attempts have been made to contact personnel which were believed to have knowledge of data manipulation at Xcel. These parties have not been willing to submit to interviews with Fraudwise staff."

Understand, please, readers, that the PUC specifically instructed its investigator to conduct these interviews. Without finalizing them, the investigator's report clearly was not completed or finished.

Let me be clear about what this means: Eleven of the 12 interviews conducted by the PUC's investigator were already completed by the time of the hearing during the mid-point of the investigation, the hearing that resulted in the April 17, 2003 order, Exhibit J. At that hearing,

the PUC specifically ordered further witness interviews until the interviewing was complete. Now, knowing that Xcel's attorney/investigator spoke with 32 employees, it would be perfectly reasonable to expect that the government agencies responsible for protecting rate payer interests would need to do 21 more interviews during the second half of the investigation (32 Xcel-identified witnesses minus 11 witnesses already spoken to by the PUC investigator leaves 21 witness interviews remaining). And how many were actually done during the second half of the investigation?

One.

And even though the PUC's investigator said these things and had these problems, the PUC found that the investigation was concluded. It found this despite the fact that the investigator interviewed only 12 people, eight of whom stated that they remembered nothing. (see Exhibit F, last page) This totally contradicts the PUC's own order issued at the halfway point of the investigation requiring the witness interviews to be completed. Further, obtaining substantive information from only four of 32 witnesses contradicts the standard established in the PUC's order instigating the investigation: the investigation is to be a "thorough and competent review." (see Exhibit J, PUC orders dated October 22, 2002 and April 17, 2003)

Third step: Create false issues and attract regulator's attention with MONEY

You can help Government not care that Xcel interviewed 32 people and the PUC investigator only obtained substantive information from 4 people by distracting government with new issues and money. All you have to do is create some issues that do not exist in the case, let's say, tree trimming, or animal control, and throw a bunch of money at these issues. Here's how it worked for Xcel:

As noted earlier, the PUC first heard that Xcel's records might be corrupt by way of articles appearing in the local newspaper. The source of the articles was Xcel's own employees. Now, understanding that it exists solely to regulate utilities like Xcel, the PUC sent out a series of orders asking the government agencies we've been talking about to assist with conducting an investigation. The orders sent out by the PUC telling everyone what they were supposed to investigate read like this:

October 22, 2002 order (order commencing the investigation) :

*Serious allegations have been made regarding **the integrity of Xcel's service quality reporting**. The Commission is determined to get to the bottom of these issues...The Commission recognizes that this auditing operation **will require multiple skills (such as accounting, engineering and interviewing)** and leaves it in the hands of the two agencies (the Department of Commerce and the RUD-OAG) to arrange for a **thorough and competent review** of these allegations. (emphasis added)*

January 6, 2003 order (order separating service quality reporting from financial issues):

A separate docket...is hereby established to investigate and audit Xcel's service quality reporting. (emphasis added)

April 17, 2003 order (order resulting from hearing at mid-point of investigation):

The Commission continues to believe that the independent investigation is the best approach for the Commission to be able to evaluate Xcel's service quality reporting and that the investigation should be allowed to reach its conclusion without delays. (emphasis added)

(see Exhibit J, PUC orders dated October 22, 2002, January 6, 2003, April 17, 2003)

Now, as you can see, the orders were very specific, identifying the issue as the “integrity of Xcel’s service quality reporting.” All three orders use the same reference: Xcel’s service quality reporting.

The issue never had anything to do with outages themselves. The issue was not what caused outages or whether there were too many outages or whether there was a group of people uniquely suffering from excessive outages. No, none of these were ever at issue. There are no facts in the record indicating a need for the PUC to act on these issues. The only issue in this case has always been Xcel’s service quality reporting.

Instead of focusing on “service quality reporting”, an area where the company’s practices have been found to be corrupt, just create new issues like tree trimming, or animal control, or maybe the need for new systems. Even though there is no evidence in the record supporting a need to increase expenditures on any of these items²⁵, government will pay attention to these new issues because you’ll attach MONEY to them. Spending money on these issues is no big deal because most of these are normal business activities that you have to spend money on anyway.

This is especially effective because there is evidence that over the past few years, you spent significantly less than the amounts budgeted in the last rate case for some of these issues. For example, \$15.8 million on an annual basis was included in the last Xcel rate case for tree trimming. The rate case was in 1992, almost 14 years ago. Staff briefing papers contain amounts actually spent for two of those 14 years: the amount actually spent on tree trimming in 1994 was less than \$12 million; in 1996, less than \$14 million. Total savings for these two

³ There is no evidence in this docket supporting the need to address tree trimming, animal control, or a new outage system, which of course makes sense given that the PUC’s orders make clear that the case never had anything to do with outages, their cause, or frequency. In fact, there is evidence that these issues DO NOT need to be addressed. Xcel acknowledged that there is no evidence in the record indicating that the current tree trimming budget is inadequate. (see Exhibit K, Sparby comments from January 22, 2004 hearing) The PUC’s investigator testified that there is nothing wrong with Xcel’s current outage reporting system—the problem is with the people using it. (see Exhibit L, O’Halloran comments from January 22, 2004 hearing) Regarding animal problems, no acorns or raccoon droppings have been detected in any of the docket files.

years: approximately \$5.6 million. So, you are just agreeing to spend in the future what you should have been spending in the past.

Just to be sure, though, you might even agree to fund a small public relations campaign by tossing a million dollars to unspecified people, even though there is no evidence in the record about why they are entitled to any money. In this way, you'll have everyone from the low income to the high income community supporting you and the remaining 21 witnesses will be protected from scrutiny.

And don't worry about the fact that it wasn't the absence of systems or the branches of trees or the teeth of squirrels that failed to provide complete documentation for 81% of all outages on the spreadsheets prepared by Xcel; that failed to include switching jobs in the data filed with the government agencies two years in a row; that failed to record a "restore time" on 45% of the trouble tickets; that misstated the duration of outages; that ordered employees to record outages as 60 minutes even when the outages were longer than 60 minutes. It wasn't a system, tree or squirrel that caused a 22% error rate in the cases for which Xcel had full documentation; nor was it a system, tree or squirrel that instructed control center employees to restart jobs to reflect a shorter outage duration. (See Exhibit B for these Fraudwise statistics)

None of this matters. Government will be so in awe of the money you threw at the not relevant issues that it won't notice that **the real issue in the case all along was people and their behavior, the investigation of which is not complete.** They won't notice that the settlement does not acknowledge or identify the cause of the problems, and does not identify the persons responsible for the problems. It won't matter. You just say it was trees and systems and squirrels. Come on, say it with me:

"WE DIDN'T DO ANYTHING WRONG. IT WAS THOSE DARN TREES, SYSTEMS, AND SQUIRRELS."

One last thing: sometimes, real life people who are not affiliated with government or a utility will come to PUC hearings to talk about their experience. This is very hard for them to do because the hearing room setting is very intimidating and the issues very technical and complicated. But, on occasion, even with these obstacles, a real live member of the public will be so affected by an issue in real life that he or she is compelled to testify at a hearing. In the Xcel story I am telling you, a woman testified about her years of frustration dealing with Xcel; told of all the outages she and her family had suffered; said how difficult it was to get accurate information from Xcel; **made clear that the settlement proposal on the table was not in the public interest and should not be approved,** even though she would benefit from it. (Exhibit M testimony of Rebecca Winegarden from January 22, 2004 hearing) Just be aware that people like this are around. But, don't worry; the PUC ignored her, too.

Fourth step: Just enjoy victory.

Now, this story might sound silly and too good to be true, but, I'm telling you, future utility leaders, it will work.

It already has.